IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 396 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE H.H.MEHTA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ISHVARBHAI @ ISU MADHUBHAI DUBLA
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 396 of 1998
MRS SHILPA J UNWALLA for Petitioner No. 1
THROUGH JAIL for Petitioner No. 1
Mr.B.D.Desai learned A.P.P. for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE H.H.MEHTA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 09/10/2003

C.A.V. JUDGEMENT

(Per : HON'BLE MR.JUSTICE SHARAD D.DAVE)

1. The present appeal is preferred against judgment and order of learned Addl.Sessions Judge, Valsad dated 24th October, 1997 passed in Sessions Case no. 131/96 wherein the present appellant i.e. original accused no. 1 was convicted for the offence under Sec. 302 of Indian Penal Code (hereinafter referred to as I.P.C.) and sentenced him to undergo life imprisonment and fine of Rs.2,000/- i/d two months imprisonment whereas other accused no. 2 & 3 were acquitted of the charges against them. The State has not preferred any appeal against the acquittal order of accused no. 2 & 3.

2. The short facts of the present case are as under:

On 13.05.1996 there was marriage of daughter of uncle of complainant Manglabhai Chamarbhai and on asking money for food by present appellant, the complainant gave Rs.60/- which were found less by the present appellant and therefore he fought at the place of marriage and kicked the complainant. Thereafter on the same day at about 5.30 p.m. complainant, Manojbhai Haribhai, Pravinbhai Radkabhai and Ranchhodbhai Radkabhai went to the house of present appellant and asked as to why he fought at the marriage place. To this, the present appellant and his sons started abusing them and hitting them. The present appellant brought one sickle and hit Ranchhodbhai on his chest and caused his death. On the basis of the complaint, offence was registered and the investigation was set into motion. The Investigation officer recorded statements of various witnesses, prepared the inquest panchanama, panchanama of scene of offence, panchanama of body of accused, got the postmortem report prepared and on coming to the conclusion that there was ample evidence against the accused, filed a chargesheet in the court of J.M.F.C. Umbergaon in the District of Valsad. The case, however, triable exclusively by the court of Sessions and was, therefore, committed to the court of Sessions. It was registered as Sessions Case no. 131/96. The charge was framed against the accused under Sec. 302,323,504,114 of I.P.C. and Sec.135 of Bombay Police Act.

3. The prosecution examined following witnesses :(1) P.W.1 Chandubhai Kantilal Shah exh. 13, (2) P.W. 2 Natwarlal Prabhubhai Bhandari exh. 15, (3) P.W. 3 Nanubhai Bhanabhai exh. 17, (4) P.W. 4 Nitibhai Raviyabhai exh. 20, (5) P.W. 5 Mukeshbhai Parbhubhai

exh. 21, (6) P.W. 6 Pravinbhai Radkabhai exh. 23, (7) P.W. 7 Anitaben Pravinbhai exh. 24, (8) P.W. 8 Dr.Arvind Muljibhai Gori exh. 25, (9) P.W. 9 Vasubhai Harubhai exh. 28, (10) P.W.10 Manojbhai Harubhai exh. 29, (11) P.W. 11 Babliben Haribhai exh. 30, (12) P.w. 12 Kishorsinh Bhupatsinh Zala exh. 31. The prosecution has also produced relevant documentary evidence like Postmortem Notes, inquest panchanama, panchanama of scene of offence etc.

4. Further statement of the accused was recorded under Sec. 313 of Criminal Procedure Code wherein the accused denied the case of the prosecution but did not examine any witness in support of his case.

5. After considering the evidence led by the prosecution and hearing the learned advocates for the parties, the trial court came to the conclusion that the present appellant is guilty of the said offence and convicted and sentenced him to sentence as stated above. Being aggrieved by the said judgment and order, the present appeal is preferred by the original accused no. 1.

6. Ms.Shilpa Unwala learned counsel for the appellant-accused has made limited submissions to the effect that the case falls under Sec. 304 Part I or Part II in the facts and circumstances of the case and not under sec. 302 of I.P.C. For that purpose she has relied on following facts.

7. The present appellant-accused had filed complaint before the Umargam police station against the deceased Ranchhodbhai and others being I-C.R.no 52/96 on 13.05.1996 at 20.10 hrs. which was before the Umargam police station against the incident wherein the present accused suffered injuries. The prosecution has failed to bring the facts regarding the injuries to the present accused on the record of the case. Moreover, the complaint filed by the present accused was first in point of time whereas incident wherein the present accused is convicted is filed at C.R.no. I.76/96 at about 23.00 hrs. The prosecution has suppressed the aforesaid facts. The scuffle has also taken place at the place of present accused. There was a sudden fight and the accused did not go to the house of the complainant, however, deceased Ranchhodbhai came to his house and on apprehension in mind of the present accused, there was a sudden fight between them. In the scuffle, the deceased Ranchhodbhai had received injuries. There is no premeditation on the part of the appellant. He was not aware whether the

deceased in company of others has come to his house in the evening to ask anything regarding the alleged verbal talk that took place between appellant and others. In the scuffle, the appellant-accused gave a blow suddenly with the sickle which he brought from the maliya of his house. In anger and losing patience, he gave one blow to the deceased not knowing that blow would be fatal. Therefore, in the submissions of learned counsel for the appellant-accused the case falls under Exception II or IV to Sec. 300 of I.P.C. and benefit should be given to the accused from converting the sentence from Sec. 302 of I.P.C. to Sec. 304 Part I or II of I.P.C.

8. In support of her submissions, learned counsel for the appellant-accused relied on the following authorities :

1. Rajendrasinh Bahadursinh Zala V/s State of Gujarat reported in 2003(2) G.L.H. 362,
2. Sekar @ Raja Sekharan V/s State represented by Inspector of Police, T.N. reported in 2003 S.C.C.(Cri) 16.
3. Ghapoo Yadav and others V/s State of M.P. reported in AIR 2003 S.C. 1620.

9. Against the aforesaid submissions, Shri B.D.Desai learned A.P.P. for the State has submitted that the way in which deceased was attacked by the present accused and his sons shows the gravity of the offence committed. It is further submitted that none of the exceptions of Sec. 300 of I.P.C. can be applied in the facts of the present case. In short, he supported the reasonings given by the trial court.

10. We have perused the authorities cited by the learned advocate for the petitioner-accused. Learned advocates for the parties have also read necessary evidence before us. In view of the fact that the present petitioner-accused has not challenged the death of deceased Ranchhodbhai, I am not discussing any depositions on record, however, to come to the conclusion whether exception 2 or 4 of Sec. 300 of I.P.C.is applicable, it is necessary to discuss the P.M.report of the deceased.

11. Dr.Arvind Muljibhai Gori, Medical Officer P.W.8, has deposed at exh.25 and stated that on 14.5.96 he received the dead body of Ranchhodbhai for autopsy at 2.15 hrs. So far as outer injuries on deceased body are concerned, they are mentioned at para 17 of P.M.report as under :

1. Incised wound 13 cm long over Lt. pectoral region all laser at muscle and thoracic cage with protuding postat lung clean margin tailing of wound downward and medival.
2. multiple contusion over lt. shoulder form black in colour.
3. Rib incised 3rd and 4th

During the autopsy, the witness also found following internal injuries :
1. Rib incised 3rd and 4th
2. 5th partical
3. I.C.space incised 2nd, 3rd, 4th.
4. right lung pale
5. left lung pale incised from ant. border
6. Rt.capric incised empty heart
All the injuries were ante mortem in nature.

12. The doctor took blood sample to decide blood group. According to doctor, the cause of the death was excessive bleeding, hemorrhagic shocks due to injuries to vital organs heart and lung. The internal injuries can be caused by muddammal sickle. The witness was shown muddammal article no. 7 and he stated that such injuries can be caused by such type of weapon. In cross-examination, the doctor has denied that if the person falls on the ground on muddammal article no. 7 which is sickle, can have injuries as described by the witness. The doctor has further admitted that multiple contusion on left shoulder found black in colour. The injury might have caused before 48 hours before the death. The doctor cannot say where actually heart is situated in the ribs.

13. In view of the aforesaid circumstances, we are of the opinion that there are two injuries on the deceased Ranchhodbhai out of which one was fatal given by the present petitioner-accused but who gave the second injury is not brought on record by the prosecution.

14. In case of State of Andhra Pradesh V/s Rayavarapu Punnayya and another reported in AIR 1977 S.C.45, the Apex Court has compared ingredients of Sec. 299 and Sec. 300 clause by clause as under :

" So that whenever a court is confronted with the question whether the offence is `murder' or `culpable homicide not amounting to murder', on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage

would be whether the accused has done an act by doing which he has caused the death of another. Proof of such casual connection between the act of the accused and the death leads to the second stage for considering whether that act of the accused amounts to `culpable homicide' as defined in Sec. 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of section 300, Penal Code is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of `murder' contained in sec. 300. If the answer to this question is in the negative the offence would be `culpable homicide not amounting to murder', punishable under the first or the second part of Sec.304, depending, respectively on whether the second or the third clause of sec. 299 is applicable. If this question is found in the positive but the case comes within any of the exceptions enumerated in Sec. 300, the offence would still be `culpable homicide not amounting to murder', punishable under the first part of Sec. 304 Penal Code. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages."

15. In case of Kishore Singh and another V/s State of Madhya Pradesh reported in AIR 1977 S.C. 2267, another Bench of the Apex court has discussed the distinction between sec. 299 of I.P.C. and Sec. 300 of I.P.C. in the following lines :

" The distinction between culpable homicide (Sec. 299 Indian Penal Code) and murder (sec. 300 Indian Penal Code) has always to be carefully borne in mind while dealing with a charge under Sec. 302, Indian Penal Code. Under the category of unlawful homicides fall both cases of culpable homicide amounting to murder and those not amounting to murder. Culpable homicide is not murder when the case is brought within the five exceptions to Sec. 300 Indian Penal Code. But even though none of the said five exceptions is

pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Sec. 300 Indian Penal Code to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any one of the four clauses of Sec.300 Indian Penal, namely, firstly to fourthly, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under sec. 299 of Indian Penal Code."

16. In case of Sukhbir Singh V/s State of Haryana reported in (2002) 3 S.CC.327, the Hon'ble Apex Court has observed the conditions for applicability of exception 4 to Sec. 300 as under :

" To avail the benefit of Exception 4 to Section 300, the defence is required to probabilise that the offence was committed without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel and the offender had not taken any undue advantage and the offender had not acted in a cruel or unusual manner. The exception is based upon the principle that in the absence of premeditation and on account of total deprivation of self-control but on account of heat of passion, the offence was committed which, normally a man of sober urges would not resort to. Sudden fight, though not defined under the Act, implies mutual provocation. It has been held by the courts that a fight is not per se palliating circumstance and only unpremeditated fight is such. The time gap between quarrel and the fight is an important consideration to decide the applicability of the incident. If there intervenes a sufficient time for passion to subside, giving the accused time to come to normalcy and the fight takes place thereafter, the killing would be murder but if the time gap is not sufficient, the accused may be held entitled to the benefit of this exception."

17. In light of aforesaid circumstances, if we look to the complaint exh. 22 filed by complainant Mukesh p.w. 5 at exh. 21, he says that Manglabhai Chamarbhai is the uncle of witness. The marriage of daughter of Manglabhai was fixed before eight months. In the said marriage from the witness side his parents,Chandu, Shailesh, sister Kapila, Manisha and the said witness attended the marriage. Deceased Ranchhodbhai was the

husband of witness's mother's sister. Ranchhodbhai did not attend the ceremony. After the marriage, they were sitting for exchanging dowry articles. As per their custom, the girl's side demands money for food. To this demand, the bridegroom's side paid Rs.60/- to present petitioner-accused which they felt very less. Thereupon, the present petitioner called the witness to come out. When the witness came out, the present petitioner caught hold of the witness by his collar. The son of brother of petitioner-accused also came there who caught hold of the witness. The petitioner gave a kick blow to the witness. This time the petitioner's sons Suresh and Raju came and started beating the witness. The relatives of the witness came and stopped the petitioner from beating the witness. Thereafter, the present accused went to his house. Thereafter, the deceased Ranchhodbhai went to the house of the present petitioner to ask why he beat the present witness. Deceased Ranchhodbhai was accompanied by brother Pravin, aunty Babli, Babliben's son Vasu. The house of petitioner is situated at a distance of 40 to 50 ft. from the house of witness. Thereafter, the witness came to know that deceased Ranchhodbhai was beaten by present accused. The witness did not visit the house of the present petitioner. However, he came to know that the petitioner gave a blow to deceased Ranchhodbhai. Witness uncle's son Vasu told him that the petitioner gave a blow of sickle in the chest of deceased Ranchhodbhai. Thereupon he gave complaint to the police.

18. The witness was cross-examined by the learned advocate for the petitioner-accused. He stated that after fight took place at the place of marriage, his wife took him to his house. Witness came to know of who went to the house of petitioner from Vasu. The witness came to know regarding the visit of Ranchhodbhai to the house of petitioner-accused after Ranchhodbhai died. The witness came to know at 5.30 p.m. that Ranchhodbhai has died. The complaint of the witness was recorded at the place where Ranchhodbhai was lying. At that time, Vasu, Babli and Pravin were present. The witness denied the suggestion that Pravin and Babli never visited the place of incident. He denied the suggestion that there are 100 houses between the house of deceased Ranchhodbhai and present petitioner-accused but clarified that there are two houses in between.

19. From the aforesaid deposition, it is crystal clear that there was no time gap between the two incidents i.e. the first instance when the petitioner caught hold of collar of complainant Mukesh and second incident whereby the deceased Ranchhodbhai went to the

house of the present petitioner-accused to inquire regarding why he had beaten his relatives. Exception 2 and 4 of Sec. 300 are as under :

"Exception 2 : Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the persona against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 4 : Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation : It is immaterial in such cases which party offers the provocation or commits the first assault."

In our view, exception 4 would apply to the facts of the present case. There was sudden fight between the present petitioner and deceased Ranchhodbhai and there was heat of passion upon sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner by taking sickle from the maliya and gave one blow to the deceased. The prosecution has failed to prove on record enmity between the parties. Only one blow with the sickle was given to the deceased Ranchhodbhai by the present petitioner-accused. There was no altercation between the accused and deceased. There was no premeditation and the assaults were given by the accused during the course of sudden quarrel. This, according to us, brings the case within the ambit of Exception IV to Section 300 to I.P.C. It is probable that there was no sufficient lapse of time between the quarrel and the fight which means that the occurrence was `sudden' within the meaning of Exception 4 of Section 300 IPC. The time gap between the quarrel and the fight is stated to be a few minutes only. Keeping in view the facts and circumstances of the case, it must be held that in the absence of the existence of common object the appellant is proved to have committed the offence of culpable homicide without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel and did not act in a cruel or unusual manner and his case is covered by Exception 4 of Section 300 IPC which is punishable under section 304 (Part I) IPC. The finding

of the courts below holding the aforesaid appellant guilty of offence of murder punishable under section 302 IPC is set aside and he is even guilty for the commission of offence of culpable homicide not amounting to murder punishable under Sec. 304 (PartI) IPC. Even otherwise, this appears to be a case of the accused exceeding the right of private defence. The appropriate conviction would, therefore, be under Section 304 Part I of I.P.C. and custodial sentence of 10 years would meet the ends of justice.

20. While awarding sentence, one factor which has weighed with us is that two rustic villagers fought over dowry which led to the death of one. The social status of the accused and the deceased, which as the materials on record show is that of the lowest strata belonging to the economically distressed class; were illiterate daily-wage earners. There was no previous enmity. A spur-of-the-moment loss of faculties led to the unfortunate occurrence. This is certainly a relevant factor to be taken note of while awarding the sentence.

21. Accordingly, the order of conviction passed by the learned trial Judge convicting the appellant-accused for the offence under Sec. 302 IPC is hereby quashed and set aside and his conviction is altered from the offence under Section 302 IPC to the offence under Section 304 Part I IPC. Accordingly, the appellant-accused is convicted for the offence under Section 304 Part I IPC and sentenced to suffer ten years RI and to pay a fine of Rs.2000/- in default to further undergo RI for two months. The appellant-accused will be given set-off for the period during which he has remained in jail as under-trial prisoner during the trial and after conviction in jail.

The appeal is partly allowed to the aforesaid extent only.

(H.H.MEHTA, J)

(SHARAD D DAVE, J)

srilatha